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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA,	)	No. CR 08-00423 JF
	)	
Plaintiff,	)	GOVERNMENT'S SENTENCING REPLY
	)	MEMORANDUM
v.	)	
	)	Date: December 18, 2008
ATUL MALHOTRA,	)	Time: 11:00 a.m.
	)	Judge: Hon. Jeremy Fogel
Defendant.	)	
	)	
	)	

Consistent with Local Rule 32-5, the government respectfully files this Sentencing Reply Memorandum in response to the Defendant's Revised Sentencing Memorandum (filed Dec.10, 2008).

As before, the government once again asks the Court to apply the stipulated Sentencing Guidelines from the plea agreement. The government believes the requested probationary sentence is inappropriate based on the facts of this case. Such a sentence would send the wrong message that a company vice president may with impunity steal trade secrets and other materials from his employer and avoid sufficient punishment.

1 Surprisingly, the defense makes an unfounded claim that the government has failed to  
2 follow the terms of the plea agreement. The claim lacks any support. At all times, the  
3 government has urged the Court to apply the Sentencing Guidelines in the plea agreement.

4 The government has noted that under an explicit provision of the plea agreement, the  
5 defendant's acceptance of responsibility expressly remains conditioned on the defendant's  
6 continued acceptance of responsibility through sentencing. The Plea Agreement signed by the  
7 defendant provides:

8 "If I meet the requirements of U.S.S.G. § 3E1.1, I may be entitled to a two-level reduction  
9 for acceptance of responsibility, provided that I forthrightly admit my guilt, cooperate  
10 with the Court and the Probation Office in any presentence investigation ordered by the  
Court, and continue to manifest an acceptance of responsibility *through and including the*  
*time of sentencing.* " (Emphasis added.)

11 This conditional language merely notes the continuing obligation of the defendant. It remains as  
12 a determination the Court will have to make during the sentencing hearing.<sup>1</sup>

13 After reviewing the present papers, including the defendant's letter to the Court, the  
14 government now requests that the two level reduction be applied in this case (assuming the  
15 defendant continues to demonstrate acceptance of responsibility through the sentencing hearing  
16 as required under the terms of his plea agreement).

17 However, the government will seek to address the relevant Section 3553(a) factors during  
18 the hearing. The government believes there are a number of defense inaccuracies concerning the  
19 scope of the defendant's conduct, the value of the misappropriated trade secret, and the  
20 defendant's efforts concerning the trade secret that the government would like to have an  
21 opportunity to note at the hearing before the sentence is imposed. For example, while the

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22  
23 <sup>1</sup> This conditional acceptance of responsibility language is standard and has been used in  
24 most plea agreements in the Northern District of California for several years. *See also U.S. v.*  
25 *Adams*, 197 F.3d 1221, 1223 (8th Cir. 1999) ("We also conclude that the government did not  
26 breach the plea agreement because the acceptance-of-responsibility recommendation was  
27 conditioned upon Adams exhibiting conduct consistent with acceptance of responsibility, and the  
agreement reserved to the government the discretion to void the agreement if Adams engaged in  
any further criminal activity.").

1 defense notes that the plea agreement was focused on one trade secret, it is relevant that the  
2 defendant misappropriated other matters involving confidential information belonging to IBM  
3 and willingly shared them with his new employer.

4 In the defense materials, former defense counsel has filed a declaration. Surprisingly, the  
5 declaration contains a number of inaccuracies and takes settlement statements out of context.  
6 More importantly, former defense counsel, who was conflicted out of the case, refers to  
7 discussions that were expressly understood to be settlement discussions and were protected under  
8 Fed. R. Evid. 410, and other applicable authorities. It would be inappropriate for government  
9 counsel to breach this agreement, even if defense counsel feels comfortable doing so. Therefore  
10 any response, if necessary, can be addressed at the sentencing hearing.

11 Finally, under an Interim Protective Agreement signed by the parties in October 28, 2008,  
12 at the “conclusion of” the case, the “defense agree[d] to return all Confidential Material to the  
13 United States . . . .” The government has requested that the defendant return all Confidential  
14 Material, including all Digital Media, to the government. The government will request this  
15 property be returned at the sentencing hearing.

16 Dated: December 12, 2008

JOSEPH P. RUSSONIELLO  
United States Attorney

/s/

18 MARK L. KROTOSKI  
19 Assistant United States Attorney

/s/

21 SUSAN KNIGHT  
22 Assistant United States Attorney

**CERTIFICATE OF SERVICE**

UNITED STATES v. ATUL MALHOTRA,

NO. CR 08-00423 JF

I, Susan Kreider, declare that I am a citizen of the United States, over the age of 18 years and not a party to the within action.

I hereby certify that a copy of the foregoing:

**GOVERNMENT'S SENTENCING MEMORANDUM**

was served today \_\_\_ by hand; \_\_\_ by facsimile; \_\_\_ by Federal Express;   X   by first class mail by placing a true copy of each such document(s) in a sealed envelope with postage thereon fully paid, either in a U.S. Mail mailbox or in the designated area for outgoing U.S. Mail in accordance with the normal practice of the United States Attorney's Office; \_\_\_ by placing in the Public Defender's pickup box located in the Court Clerk's Office.

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I declare under penalty of perjury that the foregoing is true and correct, and that this certificate was executed at San Jose, California

DATED: December 12, 2008

\_\_\_\_\_  
SUSAN KREIDER  
Legal Assistant